

settling up the estate. But the case does not decide, or profess to decide, that the executors may not *by agreement, inter se*, provide for an unequal division of the commissions, or even that one of them shall have the whole.

Upon this part of the case, therefore, I am of opinion, that the defendant, Stewart, has not succeeded in showing mistake or imposition in the settlement between him and Brown, and that there is nothing which can upon legal grounds affect the validity of that settlement, the mortgage which was given to secure the payment of the sum ascertained by it to be due, must be enforced either by selling the property remaining unsold or by appropriating to the payment of the mortgage debt the money now in bank arising from the sale of a portion of the mortgaged property.

The questions presented by the bill filed by Stewart remain briefly to be considered.

With respect to his claim to a distributive share of the estate of Thomas R. Cross, in the right of his wife, his right to an account is not understood to be contested, and the only question, therefore, in controversy upon this bill has reference to the claim of McKenna & Company, for which it is alleged the estate of Cross is primarily responsible, though the debt as shown by the proof was originally contracted by Stewart.

This debt was founded upon a joint and several single bill, executed by Stewart and Cross, to McKenna & Company, in January, 1838, to secure a debt due from Stewart to the obligees, as shown by the complainant's own proof; but an attempt is made to show that though the debt was the debt of Stewart, Cross was bound to pay it, and contracted so to do, in consideration of an indebtedness from him to Stewart. And that Cross having failed to make such payment as agreed, and the money having been paid by Stewart, he is now entitled to look to the estate of Cross for reimbursement. The evidence shows that after the death of Cross, separate suits were brought by McKenna & Company against his administrators, and Stewart as surviving obligor, and judgments recovered at April term, 1842, and that the money was paid by Stewart in the summer and fall of 1843.